

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLEE

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,254

HATTIE E. MONTGOMERY, *Appellant*,

v.

VIRGINIA STAGE LINES, INC., *Appellee*.

United States Court of Appeals
For the
District of Columbia Circuit

FILED MAR 9 1951

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APPELLEE'S STATEMENT OF QUESTIONS PRESENTED.

1. The question is whether, in a trial to recover damages by appellant for her injuries as the result of her suitcase falling from the overhead rack of appellee's bus, it was the Court's duty to have directed that regardless of whether plaintiff, or defendant's bus driver, or a passenger on the bus, placed the suitcase on the rack, it was the driver's duty to require that plaintiff's suitcase be so stowed as to prevent falling onto or against any passenger, including plaintiff, and that the failure to do so was negligence on the part of defendant sufficient to entitle plaintiff to recover damages.

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BRIEF FOR APPELLEE.

COUNTER STATEMENT OF THE CASE.

The Court's attention is directed to the fact that the appellee has repeated question #1 of the Appellant's Statement of Questions Presented and has deleted therefrom that part of the question appearing within the parentheses . . . that is (under the law and the Interstate Commerce Commission Motor Carrier Safety Regulations). The bases for such deletion stems from the fact that at no time during the trial were any regulations of the Interstate Commerce Commission introduced into evidence by the appellant, nor does any reference to them appear in the pretrial order of the case. It is therefore submitted by

the appellee that any such regulations cannot be considered as a part of the case on appeal.

Similarly, appellee has completely omitted question #2 of the Appellant's Statement of Questions Presented and would like to call to the attention of the Court that when the trial judge began his charge to the jury, he briefly went over the theory of the plaintiff's case and the theory of the defense to the action by way of summarizing the position of each. In so doing, he was merely pointing out the gist of the plaintiff's theory as well as of the defense. (R. 304, 305). It is from this portion of the charge that the appellant has taken question #2 completely out of its context when in fact no such specific instruction was given.

The evidence, while in dispute as to who actually placed the appellant's suitcase in the overhead rack, shows that the appellant testified that the driver did it (R. 20). Other witnesses testified definitely that the driver did not do it, or that they did not know who did it (R. 203, 204, 214, 215, 228, 231, 245, 246, 255, 256). The driver, himself, testified that he did not place it in the rack (R. 179, 188, 195). The driver testified further that at the time of his inspection of the baggage rack, he advised the appellant that her baggage was too large and that it should be stowed in the baggage compartment of the bus (R. 178, 180, 181, 188, 194). The testimony revealed that the appellant advised the driver that she had lost luggage before and that she intended to keep this suitcase with her at all times (R. 179).

SUMMARY OF ARGUMENT.

1. Appellant, having failed to object or take exception to the charge of the court, cannot on appeal allege error in the charge.

2. One who places himself in a position of peril and has notice thereof, is both contributorily negligent and is said to have assumed any risk attendant to such position.

3. The doctrine of "last clear chance" presupposes that the plaintiff be in a position of peril from which he cannot extricate himself.

ARGUMENT.

The lone basis for this appeal as alleged by appellant has to do with error in the instructions and charge given to the jury by the trial judge. It is well settled in the law and has been since the very earliest times that in order to appeal the ruling of the trial court either on a matter of admissibility of evidence or upon a ruling of the court on the law of the case, that the party objecting thereto must at the time the evidence is offered or at the time the ruling of law is made, object to the admission or the ruling and specify the grounds upon which he bases his objection. In the case of *District of Columbia v. Disney*, 65 App. D. C. 138, 81 F.2d 272, it was held that when no objection or exception was taken to the admission of testimony at the time, there was no basis for an assignment of error. Similarly in the case of *Phillips and Sager v. Kern*, 50 App. D. C. 317, 271 Fed. 547, this Court said that an error assigned in the admission of evidence need not be considered where no objection or exception was reserved at the trial. This principle has also always been applied to the instructions given by the court to the jury. In the decision of *Donovan v. Brown*, 75 U. S. App. D. C. 93, 124 F.2d 295, the court said:

"It is a salutary rule that errors which the trial court is given no opportunity to correct, will not in general be considered on appeal."

In this last decision, the court cited the case of *Martin v. Washington Times Co.*, 67 App. D. C. 11, 89 F. 2d 230, which also supported the proposition. The rationale for this long-standing rule would seem to be that a trial court should be given opportunity to review the rulings and to correct them if necessary during the trial of the case. This

notion was aptly stated in the case of *Shepler v. Crucibles Fuel Co.*, 140 F. 2d 371, at 374:

“The law requires that errors to be reviewable must be definitely and timely called to the attention of the trial court in order to afford that court a fair opportunity to pass upon the matter and correct its own errors, if any.”

Therefore, the appellee contends that, based upon the decisions hereinbefore cited, the appellant cannot now urge error in the charge to the jury.

It is the appellee's contention that this appellant was guilty of contributory negligence and that she had assumed any risk attendant to the stowage of her suitcase on the overhead rack after she had been warned by the driver that it would create a hazard to her. In 65 C. J. S. 706, Sec. 116, contributory negligence is defined as follows:

“Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes on persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause; conduct on the part of the plaintiff which falls below the standard to which plaintiff should conform for his own protection and which is a legally contributing cause, cooperating with negligence of defendant, in bringing about plaintiff's harm . . . ”

In the case of *Broadley v. Union Railway Company* (1942) C. C. A. 6th, 132 F. 2d 419, at page 421, the court in defining contributory negligence said:

“Contributory negligence is the negligent act of a plaintiff which, concurring and cooperating with the negligent act of the defendant is the proximate cause of the injury complained of. It directly and proximately contributes to the injury.”

In 38 Am. Jur. 849, Sec. 174, it is said:

“No one can charge another in damages for negligently injuring him where his own failure to exercise due and reasonable care was responsible for the occurrence of the injury.”

One of the earliest cases in which our Supreme Court defined contributory negligence was the case of the *Baltimore and P. R. Company v. Jones*, 95 U. S. 439, 24 L. Ed. 506. In that case the plaintiff's decedent insisted on riding on the cowcatcher of the train after warnings by R. R. employees of the danger involved. When recovery for his death was denied, the Supreme Court, upon review, had this to say of contributory negligence:

“The Company, although bound to a high degree of care, did not insure his safety. He was not an infant nor non-compos. The liability of the Company was conditioned upon the exercise of reasonable and proper care and caution on his part . . . He was, himself, the author of his own misfortune.”

The opinion also stated that when a plaintiff so far contributes to his injury by his own negligence or want of ordinary care, that but for such negligence or want of care, the misfortune would not have happened, he cannot recover although the defendant was guilty of negligence also, in the same connection.

Assuming without admitting that the appellee was guilty of negligence in that their agent, the driver, did not forceably take this appellant's suitcase from the rack despite her objections, appellee submits that she, herself, by remaining seated under the suitcase and by refusing to allow the driver to safely store it in the baggage compartment (R. 179, 180, 181, 188), acted in such a way as to indicate an utter lack of due care and caution and is consequently guilty of contributory negligence.

The appellee denies that it was in any way negligent because of its driver's failure to forceably stow the appel-

lant's luggage. We recognize that if both parties to an action are negligent, the doctrine of assumption of risk is synonymous with that of contributory negligence. But, as stated in 65 C. J. S. 710, Sec. 117, the true doctrine of assumption is said to arise:

“where there is no question of the defendant's negligence but where the risk is voluntary assumed in the course of a master and servant or some other voluntary relationship.”

The driver of the coach could not under any circumstances compel the appellant to part with her luggage. All that he could do was to warn her that it was too large for the overhead racks and to request that he be permitted to stow it in the baggage compartment, which place is provided by the carrier for the carriage of luggage that is too cumbersome to ride in the overhead racks and which constitutes a hazard to passengers by the fact of its being cumbersome (R. 199, 180, 181, 188, 197). The driver testified that it was a company regulation that a driver not take luggage from a passenger if that passenger will not surrender it at his request (R. 194, 195, 197). In 13 C. J. S. 1548, Sec. 779:

“A passenger may be guilty of contributory negligence where he acts in disregard of reasonable regulations or directions of the carrier, provided he has timely notice thereof . . . ”

In addition to the company regulations, there is case law to the effect that for an agent of a carrier to take property from a passenger which the passenger wants to carry with him and to do so against the passenger's wishes and by the use of any force is a conversion for which that carrier can be held liable in damages. *Smith v. The Atchison, Topeka and Santa Fe Railway Co.*, 97 S. W. 107; *Aufdenberg v. The R. R. Co.*, 132 Mo. 565, 34 S. W. 485; *Del. L. & W. R. Co. v. Bullock*, 36 A. 773.

The proposition that it is not negligence for a carrier to permit a passenger to retain his own luggage is discussed

in the case of *Merritt v. The Interstate Transit Lines*, C. C. A. 8th, 1948, 171 F. (2d) 605, which involved a situation wherein the plaintiff boarded the defendant's bus at Council Bluffs, Iowa. Two hours later another passenger got on the bus carrying a suitcase which he put in the overhead rack above the plaintiff's seat. Thirty minutes after this suitcase was put in the rack, it fell and struck the plaintiff on the head. The plaintiff's theory of negligence was to the effect that the driver was negligent in not inspecting to see if that piece of luggage was properly stowed. The trial court granted a directed verdict for the defendant at the close of the plaintiff's case, from which this appeal followed. The appellate court held, firstly, that the doctrine of "*res ipsa loquitur*" was inapplicable because the element of exclusive control was not vested in the defendant carrier and held, secondly, that it is not negligence for a carrier to let a passenger keep his own luggage in his possession. The court said at page 609:

" . . . it is not negligence for a carrier to permit a passenger to carry and keep his baggage inside of the car and in his own possession and control and that the negligence of such owner of baggage is not attributable to the carrier unless the agents of the carrier knew or, in the exercise of ordinary care, should have known, that the baggage was placed in a position that would endanger the safety of *other* passengers." (Italics added.)

This case definitely implies that a party who would put her own luggage in an overhead rack cannot be heard to complain of the carrier's negligence if that luggage should fall and cause injury based merely on the fact of the carrier's duty to inspect, if in fact the inspection was made. In the case at bar, the appellant was fully aware of the danger inherent in the stowage of the luggage and cannot complain that the carrier was negligent when she, herself, was or should have been, more aware of the danger than the carrier.

In the case of *Rosenthal v. New York, New Haven and Hartford Railway Co.*, 88 Conn. 65, the plaintiff was injured by a falling suitcase which had been placed in the overhead rack by a fellow passenger. The plaintiff alleged negligence against the carrier in that the carrier stopped the train very suddenly so as to cause the suitcase to fall upon him. The court held that the furnishing of overhead racks for the purpose of storing baggage is an invitation by the carrier to the passenger to use them to the extent of the apparent limit of their safety and while they are so used the carrier is bound to operate its conveyances so as not to endanger the safety of passengers sitting in seats beneath the racks because those passengers are not bound to maintain a lookout against falling baggage unless the danger is so obvious that it ought to attract attention of an ordinarily observant person.

In *Prunte v. Allred*, 165 P. 2d 935, the plaintiff boarded the bus and seated herself on the aisle seat directly behind the driver. Shortly thereafter a fur coat fell from the overhead rack causing her no injury. At the next stop a passenger boarded and seated herself on the inside seat next to the plaintiff, after first placing her small cardboard suitcase in the rack directly above the plaintiff. It was this latter suitcase which fell and caused the plaintiff's injury. The defendants asked the trial court to instruct the jury on contributory negligence, basing this request upon the fact that since the fur coat had fallen, the plaintiff should have been aware that the subsequently stowed suitcase might fall. The trial court refused this instruction and this refusal was one of the bases for appeal. In affirming the trial court's refusal to grant such an instruction, the appellate court said:

“she did not place the baggage in the rack. She was not charged with the duty of inspection, nor did she assume it. She had no notice requiring her to be on the lookout to protect herself against such danger.”

Appellee submits that in the instant case, the appellant had repeated notice requiring her to be on the lookout and warning her that her own suitcase might fall (R. 178, 180, 181, 188, 194).

An exhaustive search of reported cases dealing with instances in which the plaintiff has been struck by luggage or baggage falling from an overhead rack of either a rail or motor carrier, does not disclose one reported case in which a person who was struck by his or her own luggage brought an action against the common carrier. There are innumerable reported cases in which the plaintiff had been injured by falling luggage which belonged to other passengers and even to a travelling companion, but none by the owner as in this case. This, alone, should indicate a basic weakness in the appellant's position.

In the case of *Bowes v. New England Transportation Co.*, Conn. Supreme Court, 1940, 10 A. (2d) 589, the plaintiff struck her head on the overhead baggage rack when getting up to leave the bus. There was no proof that the rack was defectively constructed in any way and as a matter of fact, there was proof on behalf of the carrier that the rack was approved by a motor vehicle commission in Connecticut and that it was of the type universally used on buses in that area. The plaintiff recovered in the trial court but this was reversed upon appeal. In the course of the opinion, the court, after citing the case of *Rosenthal v. New York, New Haven, and Hartford Railroad*, (*supra*) stated:

"The general rule applicable to a situation such as this is that the carrier is bound to warn passengers of a danger when the circumstances are such that the carrier ought reasonably to foresee that it exists and that a passenger would not in the exercise of reasonable care be likely to observe and apprehend it."

The reasoning behind the court's reversal was that this luggage rack was in plain view not only in the coach in question, but in all motor coaches and that the mere fact that it was possible for the plaintiff to bump her head on

it when getting out of her seat next to the window does not make the carrier liable in damages to her.

In *Bannister v. The Berkshire Street R. R. Co.*, Supreme Court Mass., 1938, 18 N. E. (2d) 342, the plaintiff struck her head on the baggage rack while getting into her seat. The trial court entered a directed verdict for the defendant and upon appeal the appellate court held that the carrier was bound to a high degree of care as regards its passengers, but that they did not contemplate making the carrier an insurer of the passenger's welfare. The court found that the rack was a necessary part of the carrier's business and not negligently constructed. The rack, furthermore, was plainly visible and whatever danger grew out of its being where it was not concealed from the plaintiff at all. That being so, the plaintiff has no right to recover against the carrier. In summary, the court said at page 344:

"The source of the danger was neither wholly nor partially concealed . . . The evidence falls short of showing any failure of the defendant to exercise the care for the safety of the plaintiff as its passenger required of a common carrier."

The appellant would appear to be relying on the doctrine of "last clear chance". Appellee states that in the pre-trial order no mention was made of this as the appellant's theory of the case, nor did the appellant request the trial court to charge on this doctrine. Did not these formal defects exist, the doctrine of "last clear chance" would still be inapplicable to the present situation. In the recent case of *Dean v. The Century Motors, Inc.*, 81 App. D. C. 9, 154 F. 2d 201, at page 10, this Court stated:

"The doctrine ('of last clear chance') presupposes a perilous situation created and existing through the negligence of both the plaintiff and the defendant but assumes that there was a time after such negligence had occurred when the defendant could, *and the plaintiff could not*, by the use of means available, avoid the emergency." (Italics added.)

This principle was quoted and approved by this Court in a later decision, *Capital Transit Co. v. Grimes*, 82 App. D. C. 393, 164 F.2d 718. In the present case, the appellant was on notice of the possibility of the suitcase falling and could at any time from the time of that notice have taken it down herself, have asked other passengers who were also aware that it was too large to be safely stowed to take it down, or could have asked the driver so to do. This being so, it puts the appellant in the position of having been able to remove the possibility of any subsequent injuries at any time she so desired.

CONCLUSION.

In conclusion, the appellee states that this appeal is without merit, firstly, because the failure to take objections or exceptions to the rulings of the trial court, particularly to the charge to the jury, cannot on appeal be the basis for alleged error; secondly, notwithstanding formal defects, the charge to the jury was correct regarding the contributory negligence of the plaintiff to the action and, thirdly, the doctrine of "last clear chance" is not applicable to a situation of this nature.

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